No. 5143

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOULTON MINING COMPANY (a corporation), CLARK-MONTANA REALTY COMPANY (a corporation), ELM ORLU MINING COMPANY (a corporation), and J. ROSS CLARK,

Appellants,

vs.

ANACONDA COPPER MINING COMPANY (a corporation),

Appellee.

REPLY BRIEF FOR APPELLANTS.

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Appellee has filed a voluminous brief, consisting of 368 pages of printed matter supplemented by a map appendix. We cannot allow certain matters therein presented to pass unchallenged and we will confine this reply to only such matters as seem vital. The opening portion of appellee's brief is devoted to criticism of appellants' method of presentation of this appeal because it does not accord with appellee's notion as to how this should be done. Appellee takes this court laboriously through level after level and raise after raise of the Poser mine workings from the

surface down to the 1300 level, discussing in great detail their version of the geological conditions there exposed, devoting nearly half of its brief to this effort. Appellants purposely avoided burdening this court with these details, not, as appellee unjustly insinuates, because of any "aversion to them", but for the very good reason that the trial court in rendering its decision had made certain findings of fact covering these controverted details which necessarily made it highly inappropriate to further discuss them here. If appellants had attempted to present this great mass of detailed facts in the light of the testimony of their own witnesses, they could convince this court that the physical situation is not the one-sided picture which appellee has painted. But in the face of the well-known rule that such findings of fact by the trial court will not be disturbed on appeal when the evidence below is in conflict, appellants would have laid themselves open to just criticism had they attempted such a fruitless undertaking and appellee would have been the first to censure them for this breach. The fact that appellants did not present these details in their opening brief should have been sufficient notice to appellee that they did not make any point of such matters and have thus saved appellee's time as well as that of this court. At the risk of repetition, we reiterate that the only point which we urge here on this appeal, as far as the Poser vein is concerned, is, that a geological occurrence, as uniformly and highly mineralized as the assays prove appellants' Poser vein to be, constitutes a vein in contemplation of law.

QUESTIONS URGED ON THIS APPEAL ARE MATTERS OF LAW.

Appellee erroneously states that the development of so-called questions of law has remained for this review on appeal (p. 4, Appellee's Brief), insinuating that these questions urged here were not urged in the trial court. Appellee is mistaken, for each point of law urged by appellants on this appeal, with one exception, was urged below, as the printed briefs filed with the trial court and the transcript of the oral arguments will establish. That one exception was the intimation of the trial court in its opinion that the angle formed by the "View" vein with the Poser east end line plane being locally less than 45° precluded the exercise of an extralateral right by appellants as to the ore body in dispute. For appellee to contend that the other questions raised by appellants on this appeal do not involve the determination of legal principles as applied to the facts is to ignore what is obvious. It should be noted that in the presentation of these questions in appellants' opening brief, particularly as to the Intermediate-"View" vein situation, we based our arguments almost exclusively upon appellee's own interpretation of the physical facts and the great majority of the illustrative diagrams used in that connection are of appellee's own making. They are not in any position to complain on this score.

Counsel misconstrue the effect of *Stewart Mining Co. v. Ontario Mining Co.*, 237 U. S. 350, saying that there "a question was presented as to the right to follow extralaterally a vein with a divergence on strike of less than 45 degrees from the end line planes

* * * ," and that this was the law point which justified appellate consideration. (Appellee's Brief, p. 11.) Though the court did mention this question as one of the grounds for entertaining the appeal, yet later on in its opinion (237 U. S. 358-9) it expressly stated "We, however, are not required to pass upon the question * * * ," "We may put to one side" this question, and again said "It is immaterial what view the court had or expressed of the angle the downward course of the dip must be to the strike." (p. 361.) What then was the principal jurisdictional point which induced the court to entertain the appeal? As set forth in the language of the opinion quoted in our opening brief, that court stated that even though the courts below in effect had found that no part of the apex was in plaintiff's mining claim, yet the major question involved was "the application of the apex and extralateral rights provisions of §2322, U. S. Revised Statutes." The case is directly applicable because appellants contend here that the trial court erred in its application of the term "vein or lode" as used in the mining statutes and in refusing to find the Poser vein here under consideration to be a "vein" in contemplation of law. It is also interesting to note that the trial court itself injected the 45° angle question into the instant case, which question counsel contend furnished the basis for the entertaining of the appeal in the *Stewart-Ontario* case.

The other questions raised in connection with the Intermediate-"View" vein situation, viz.: The existence of a sub-fault apex for the "View" vein; the controlling effect of the "Pilot" vein apex in determining

ownership of ore bodies in the "View" vein, both being, according to appellee, branches of the Emily vein; the asserted coincidence for hundreds of feet on dip and strike of the alleged "View" and Intermediate veins, throughout which area of coincidence not a single witness for appellee is able to distinguish and segregate the material of one alleged vein from the other; all give rise to "the correct application of the apex and extralateral rights provisions of §2322, U. S. Revised Statutes," which furnished the basis for appellate jurisdiction in the *Stewart-Ontario* case.

THE TRIAL COURT ERRED IN NOT AWARDING APPELLANTS EXTRALATERAL RIGHTS ON THE "VIEW" VEIN.

Counsel express surprise (Appellee's Brief, p. 14) at appellants' contention that, at the very least, the trial court should have awarded them extralateral rights on the "View" vein west of the 370-foot point where, on the trial court's own finding, the apex of the Emily vein, which it also holds controls ownership of the ore body in the "View" vein, crosses the Poser south side line and enters that claim.

Counsel state that appellants made no such claim in the court below either in the complaint or in the printed or oral arguments and that no error has been assigned because of the trial court's failure to award appellants these vein segments. Let us see if these sweeping assertions are founded in fact.

Paragraph XIII of the complaint (Tr. I, p. 9) alleges that a vein "which is for convenient reference designated the Intermediate vein" apexes in the Poser

claim for its full length and dips southerly underneath the adjoining property of defendant. Paragraph XVII (Tr. I, p. 11) sets forth that defendant has been engaged in mining this Intermediate vein on its 2600 and 2800 levels. Paragraph 1 of the prayer to the complaint (Tr. I, p. 15) asks that plaintiffs' title to the Intermediate vein as described be decreed good and valid, and that defendant be forever enjoined from asserting any adverse claim thereto between the Poser extralateral planes passed through its end lines. Certainly this described the vein segment in controversy. It was the vein from which defendant was mining between its 2600 and 2800 levels in which plaintiffs were interested and the right to which they sought to have established and confirmed in themselves as owners. But appellee urges that the trial court found that the "Intermediate" vein did not extend outside Poser vertical boundaries. It is true that the court did find that the Intermediate branch of the Rainbow vein did not extend extralaterally down to and include the ore body in controversy but this was only one of the vein segments which plaintiffs had described as the Intermediate vein. As has just been noted, plaintiffs sought to have their title quieted to the vein which extended extralaterally and beneath defendant's surface down to and including the ore body in question. As far as designation and description is concerned this lower vein segment including the disputed ore body is more certainly identified in the complaint itself as being the vein to which plaintiffs sought to establish extralateral rights than the upper segment which appellee asserts does not exist extralaterally at all as far

as the Poser claim is concerned. Certainly appellee by naming the vein in dispute by a different name cannot prevent appellants from being awarded what appellee concedes belongs to them. The vein below whether named "View" or "Intermediate" was the vein in controversy and about which there was dispute as to ownership. Since this is a hearing *de novo* in an Appellate Court sitting in equity this court has the unquestioned power to see that appellants are decreed title to as much of this vein as they may establish title to and if necessary to allow them to amend their pleadings to conform to the proof, assuming that such amendment were essential.

Norton v. Larney, 266 U. S. 511, 516;
Simmons v. Swan, 11 Fed. 2d. 267, 268 (1st C. C. A.);
In re Plymouth Cordage Co., 135 Fed. 1000, 1003 (8th C. C. A.);
U. S. Rev. Stats. 954.

Appellants are not mind-readers and could not anticipate what the court below might decide as to there being one or two veins in the disputed area claimed by them to be occupied by the Intermediate vein and hence could not have been under any necessity to have made such application below even assuming that it now be essential to do so. It is also interesting to note that appellee places its "View" vein in practically every working underneath Poser surface where the Intermediate vein is admitted to exist, as being coextensive and coincident with the latter vein, so that the description of the vein in the complaint to which title is claimed and which is asserted to extend extra-

laterally and embrace the ore body in the vicinity of the 2600 and 2800 levels fits the "View" vein perfectly and describes it in detail. It would certainly be a travesty on justice if appellee could avoid the plain intent of a pleading by a mere juggling of names.

Appellee urges (p. 29 Appellee's Brief) that appellants should have called the matter of this admission made by its counsel to the lower court's attention and given appellee some intimation that appellants intended to claim the benefit of it. In view of the fact that this was appellee's own admission, made, not in the heat of oral argument, but voluntarily and premeditatedly in cold print over the signature of all of appellee's counsel with the undoubted object of influencing the court below to hold that the balance of the vein belonged to appellee, it would not seem that appellee should be heard to complain. Appellee itself brought the matter to the trial court's attention and if the trial court failed to grasp the scope of the issues and failed to award to appellants a segment of vein belonging to them both by appellee's express admission and by the inescapable logic of the court's own findings as to the facts upon which it awarded appellee the balance of this vein, it would not seem as if appellants could be successfully charged with any failure to advise the trial court of the obvious. Appellants certainly did their best to convince the court below that they were entitled to the entire vein extralaterally from end line plane to end line plane of the Poser claim, including this segment west of the Emily apex crossing. What more could they have done?

It is elementary that such admissions by counsel who are sworn officers of the court, especially when such admissions are made deliberately in printed briefs over the signature of all the counsel representing that side, have "the same weight and significance * * * as though they were testifying as witnesses," and such admissions can not be withdrawn in an appellate court and are even binding at a subsequent trial.

Appellants made no motion below for a retrial or modification of the decree for two sufficient reasons. First, judging from the attitude of the trial court as expressed in its decision, appellants would have accomplished nothing by doing so, and second, the trial court left Butte almost immediately after rendering its decision and only returned shortly thereafter for a very brief stay before leaving the state to be gone some weeks. Counsel who conducted the trial of the case for appellants were both away from Montana at the time and it was decided that an appeal would be the most certain and expeditious method of correcting errors.

In their attempt to escape the force and effect of their own admission (pp. 29-30. Appellee's Brief) counsel for appellee say that their admission of ownership by appellants of all ore and minerals extralaterally in the "View" vein west of the 370-foot point is qualified by the statement "in so far as the plaintiffs (appellants) have the apex of the View vein in their claim westerly from the Emily vein crossing." What did they make the admission for if they intended to qualify it by a statement which they urge has the

effect of immediately nullifying it? Can they expect this court to accept such a manifestly puerile argument which either falls of its own weight or convicts them of inserting a meaningless and futile statement in their printed brief? But let us see how they endeavor to avoid the logic of the trial court's conclusions as to the existence of the "View" vein apex. Counsel correctly state (p. 30, Appellee's Brief) that the trial court found the "View" vein to be a branch of the Emily and also found that the Emily apexed in appellee's ground for the easterly 370 feet of the length of the Poser claim. It was upon these findings that the court awarded appellee the ore body in dispute which was embraced in this 370-foot extra-lateral sweep. It will be noted that the only place where the "View" and Emily veins were found to join was entirely to the east of the Poser claim in the extreme easterly end of the 1550 drift. But appellee says west of the 370-foot point the two veins are not shown to have joined. Neither are they shown to have joined at any point west of the Poser east end line. The trial court assumes this to be a fact as a result of its finding that the two veins join east of the Poser claim and bases its decision on this assumption. And yet counsel argue that when the 370-foot point is reached this assumption no longer holds west of that point. Naturally they want the facts all resolved in their favor and when favorable assumptions and findings result in conferring rights on them they are willing to accept them, but the moment these favorable assumptions and findings react and confer rights on appellants, then they would repudiate them, but only

in so far as they work to their disadvantage. The 370-foot point is the magic point of demarcation. East of that point the trial court's reasoning is thoroughly acceptable, west of that point it no longer controls.

How does appellee's own representation of the facts correspond with opposing counsels' argument that the "View" vein apex is not shown to exist in Poser ground west of the 370-foot point but may be found south of the Poser south side line? In appellants' opening brief (p. 69, illustrated by Appendix Diagram No. 14) we pointed out the fact that it was inevitable that the "View" vein should apex in Poser ground west of the 370-foot point. All of appellee's own cross-sections indicate this. Exhibits Nos. 119, 120, 121 and 122 (see Diagrams Nos. 2, 3, 4 and 10 in Appendix to Appellants' Opening Brief) being cross-sections through the Poser claim commencing at the Poser east end line and extending westerly as far as the middle of the claim, show the "View" vein coming up into Poser subsurface across the Poser south side line plane in such an attitude and with such uniform regularity that it will inevitably encounter the Emily vein far beneath Poser surface and this will occur farther and farther inside of the Poser claim as we proceed westerly because the strike of the "View" vein is north of west and the strike of the apex of the Emily vein, which the trial court finds it joins, is also north of west, as appears from Diagram No. 14, Appendix to appellants' opening brief. There is no suggestion on any of these cross-sections of appellee's own making that the "View" vein reverses its dip before it encounters the Emily, as counsel now

argue is a *possibility* and the trial court made no such finding of fact. The "View" vein, according to Sales' (appellee's witness) own testimony, is last seen by him extending westerly as a gouge in the Rainbow vein in the 1334 drift (Tr. pp. 1261-1263) a point which is well over 600 feet west of the Poser east end line and over 400 feet north of the south side line. On the 1000 level the Intermediate-"View" vein is found at approximately the same distance from the east end line and even further away from the Poser south side line. This is appellee's own testimony. According to the trial court's findings it joins the Emily vein dipping in the opposite direction and overhanging it at these points. It cannot possibly apex to the south of the Poser claim as appellee suggests. A final answer to this suggestion is the fact that it is not found in the many workings on the higher levels particularly on the 500 and 700, where it would necessarily appear if it did what appellee merely suggests it might do. Counsel are perfectly willing to take advantage of presumptions flowing from established facts which operate to appellee's advantage, but the moment these presumptions work to appellee's disadvantage they will have none of them. Appellants are assuredly entitled to reasonable inferences which follow from appellee's own portrayal of conditions, especially when the trial court adopts these as the basis for its findings.

Appellee asserts that appellants are asking for a decree for "ore bodies where no adverse claim has been asserted, and to ore bodies undeveloped and unknown, and perhaps non-existent." (p. 31 Appellee's Brief.) Of course, if all this be true then appellee

can have no objection to appellants being awarded this vein segment. As a matter of fact appellee in its answer denied that appellants were the owners of any portion of the veins in controversy and went still further and alleged that appellee was the owner and in possession of "all lodes and ore bodies" lying within the vertical boundaries of appellee's mining claims. (See Appellee's Answer p. 60 and again on p. 64 of the Transcript.) If this is not the assertion of an adverse claim to the segment of vein under discussion it is difficult to conceive what would be. If appellee had wished to avoid the issue as to this particular vein segment it could obviously have done so by entering a disclaimer as to such portion. It certainly cannot now escape the consequences of its failure to exclude the issue from the case.

The obvious answer to their belated claim that these ore bodies are unknown and undeveloped is their own admission that appellants "are entitled to all ore and minerals in the 'View' vein" between the extralateral planes described by them. If this is not an admission that such "ore and minerals" exist, it is difficult to conceive of an admission which would cover the situation. Such admission has "the same weight and significance" as if "they were testifying as witnesses." As a matter of fact the "View" vein admittedly extends down to the 3000 level just east of the segment in question, it is found extending for 300 feet westerly of the 370-foot plane on the Poser 2200 level where it had been stoped by appellants immediately above this area. The westerly end of the 2524 drift on the "View" vein actually penetrates westerly beyond the

370-foot plane and is vertically beneath appellee's surface.

Counsel further say that there was no error assigned on this phase of the case and therefore that the court here on appeal cannot consider the point. (Appellee's Brief p. 32.) How counsel can seriously urge this is difficult to understand. Appellants assigned as error the failure of the trial court to award it title to any portion of this particular vein extralaterally between Poser end line planes. (Assignments of Error XXV, XXVI, XXVII, Tr. V pp. 2262-2263.) The whole includes the part. It would have been superfluous and justly open to criticism had appellants assigned error as to each particular segment of this vein.

If appellants are not decreed this vein segment, what will be the inevitable result? Hereafter when appellee sees fit to enter this territory and mine this vein it will meet any claim of ownership which appellants may assert by the contention that the title to this segment is *res adjudicata;* that it was in issue in this suit, as the pleadings will establish. A decree dismissing the bill and "that plaintiffs take nothing" if allowed to stand unmodified, absolutely and forever precludes appellants from hereafter asserting any claim of ownership to this particular vein segment. Otherwise, why are counsel so anxious to prevent appellants from having such a decree?

INTERMEDIATE-"VIEW" VEIN SITUATION FURTHER ANSWERED.

It is only appropriate and logical that the discussion of problems related to the Intermediate-"View" vein

situation should be continued at this point and we, therefore, proceed to a reply of the latter portion of appellee's brief devoted to further consideration of these problems. (pp. 295-362.)

On page 297 counsel reiterate a statement made in other places in their brief that the "View" vein stopes strike "northwesterly at an acute angle from said east end line plane." Their object in repeatedly referring to this "acute angle" is to give this court the idea that in order to exercise extralateral rights appellants would be compelled to follow the "View" vein more on the strike than on the dip. For the purpose of setting this matter at rest once and for all we have had the angle which the average strike of the "View" vein makes with the Poser east end line plane measured as accurately as possible for each level and the results are as follows:

Poser	1000	level	58°
"	1300	"	70°
"	1500	"	60°
"	1700	"	50°
"	1700	"	50°
"	2000	"	50°
"	2200	"	50°
"	2500	" (west of Corra fault)	49°
("	2500	" (east of Corra fault)	41°
(Badger	2600	"	
"	2800	"	41°
"	3000	"	45°
"	3200	"	44°

As demonstrated by the strike in the two lower levels the more southerly strike of the vein on the 2600

and 2800 levels above is only local. In the entire dip extent of this vein of over 2000 feet, as disclosed in these workings, there are only two levels where the angle its average strike makes with the Poser east end plane is as much as 4° less than ~~a right angle.~~ 45°.

Counsel devote many pages of appellee's brief to a discussion of problems bearing on the question as to whether there is a separation of the "View" vein from the Intermediate vein and also whether the "View" vein is a branch of the Emily. (pp. 298-314.) We purposely refrained from discussing these propositions in our opening brief because the trial court had decided these questions of fact adversely and to try and reopen them in the face of conflicting evidence would be useless. Many of the facts and conclusions of witnesses are misstated by counsel or an erroneous interpretation placed on them but it would serve no useful purpose to point these out and would merely consume the time of this court to no advantage.

Our argument as to the "View" vein proceeds on the assumption that the court found it to be a branch of the Emily and, accepting that fact, the court should have awarded appellants the rights in the "View" vein here contended for.

APPELLANTS ARE IN ANY EVENT ENTITLED TO A DECREE TO THAT SEGMENT OF THE "VIEW" VEIN WEST OF THE EMILY CROSSING.

Disputing this claim, counsel reassert much of their argument advanced in the first portion of their brief. They reiterate that "there is neither allegation nor proof that the appellee asserts any adverse claim to

this vein * * * ." (p. 316 Appellee's Brief), in the face of the plain allegations of their answer twice repeated that appellee is the owner and in possession of "*all* veins, lodes and ore bodies within the surface boundaries, extended downward vertically" of the lode mining claims lying to the south of the Poser claim. (pp. 60, 74, paragraphs XIII and XVII, Appellee's Answer.) If this is not the assertion of an adverse claim to this particular vein segment in question, then the English language fails miserably in expressing ideas.

They state that "there is not a scintilla of evidence in the record that the 'View' vein exists under appellee's ground west of this plane of the Emily crossing." (p. 316 Appellee's Brief.) Is this an accurate statement of the fact?

1. Appellee's skeleton model (Defts. Ex. No. 125) and plan map exhibit of the Poser-Elm Orlu 2500 level (Defendant's Exhibit No. 114) indicates the "View" vein or a branch extending several feet west of this 370-foot plane and existing vertically beneath the surface of appellee's Mill View claim, not many feet, only 50 feet or so, it is true.

Plaintiff's skeleton model (Ex. 31) and plan map of the Poser 2500 level (Ex. 26) shows the same fact.

2. Of course, counsel claim the benefit of all presumptions of fact which have any tendency to establish appellee's contentions, while they begrudgingly concede that such presumption can operate in appellants' favor. They gladly accept the trial court's findings that the "View" vein is a branch of the Emily and that the Emily apex in their ground for the east-

erly 370 feet of the length of the Poser claim is controlling as far as Poser extralateral rights for this length is concerned. We challenge counsel to point to "a scintilla of evidence" establishing an actual junction of the Emily and "View" veins anywhere in this easterly 370 feet of the Poser claim or any direct evidence whatsoever that the "View" vein has any other attitude where exposed in any of the workings in this 370-foot distance than a definite southerly dip which has persisted upward for nearly 2000 feet. All of their cross-section maps indicate this uniform southerly dip well within the Poser sub-surface. And yet the court's findings are based upon mere projections and no positive evidence whatsoever through hundreds of feet of unexplored territory in order to take this "View" vein to an apex outside and to the south of the Poser claim. The junction found by the trial court to exist, of the "View" vein with the Emily, is based upon an exposure existing entirely to the east of the Poser end line. Therefore, the taking of the "View" vein on a reverse dip to an apex outside and to the south of the Poser claim is necessarily a matter of presumption and projection throughout. No uniting of "View" vein with Emily can be pointed to in this 370-foot distance and not only is there no continuous connection through to the surface, but, on the contrary, hundreds of feet of projection are required to take the apex of the "View" vein out of the Poser claim to the south.

As already pointed out, we not only have the "View" vein actually extending west of the 370 foot plane and vertically beneath appellee's surface but

we have it extending down from the 1700 Poser to the 3200 Badger level, a distance of 1500 feet on the dip, immediately to the east of the 370 foot plane passed through the point of Emily apex crossing and the "View" vein is also exposed extending longitudinally in the Poser 2200 level for a distance of over 300 feet westerly of this 370 foot plane, where the vein has been stoped for a portion of the distance, and immediately to the north of and above the extralateral portion of this segment. It is not an unreasonable presumption to indulge that the vein exists in this extralateral area to the west of the 370 foot plane.

3. Counsel in their printed brief in the trial court freely admitted that appellants were * * * "entitled to *all ore and minerals in the View vein* between the plane of their west end line and a parallel plane drawn down through the point where the Emily crosses the south side line of the Poser." If this is not an admission by counsel of the *extralateral* existence of the "View" vein west of the 370 foot point, it is difficult to conceive of language which would constitute such an admission.

APEX OF "VIEW" VEIN IS IN POSER GROUND WEST OF THE 370 FOOT PLANE.

Urging that appellants have shown no apex of the "View" vein west of the 370 foot point and in support of their contention that the "View" vein might possibly reverse its dip, counsel point to a single local "quirk" in what they claim to be a branch of the

"View" vein appearing in the stub raise run up as an extension of the 1736-A raise. This is a little local feature narrow in width and exposed but a few feet in length and, to use the language of the trial court employed in its decision, "is a region of small seams, faults, veins and branches, wherein identity and correlation is not easy." (Tr. V, p. 2248.) The stub raise is at least 20 feet east of the Poser east end line plane and nearly 400 feet east of the 370 foot plane. Sales' (Appellee's witness) notes (Exhibit No. 172) also show that this northerly dipping stringer is only one of two branches and that the other extends on up with normal dip. He also testified to "more or less branching" in the upper part of the raise. (Tr. V, p. 2179.) Barker also testifies that "the vein splits going up." (Tr. V, p. 2211.)

On the other hand, to establish the apexing of the "View" vein in the Poser claim appellants refer to two of appellee's own exhibits, cross-sections B-B and 309. (Exhibit Nos. 121 and 122, also appearing as Diagrams Nos. 4 and 10 in Appellant's Appendix to its opening brief.) Cross-section B-B, passed through the Poser south side line at a point about 100 feet east of the 370 foot point, shows the "View" vein crossing the Poser south side line plane and extending up into the Poser claim for nearly 1000 feet on uniform dip and to within a comparatively short distance of the Emily vein of counter dip, with which it will inevitably unite, according to the finding of the trial court. This situation exists vertically beneath Poser claim surface and if appellee can rely on presumptions of union and dip and continuity to take the

apex of the "View" vein out of Poser surface for 370 feet, certainly *appellants are entitled to rely on these identical presumptions to continue the identical apex to the west of its crossing into Poser ground.* Cross-section 309 is another of appellee's sections near the center of the Poser claim and passed through a point on the Poser south side line approximately 200 feet west of the 370 foot point which marks the Emily apex crossing. This shows the "View" vein already well within Poser subsurface and to the north of the south side line plane extending up on its characteristic southerly dip from the 2200 level. The combined Intermediate-"View" vein appears above between the 1300 and 1000 levels with the same uniform southerly dip. Therefore, we have a dip distance of over a thousand feet extending up entirely within the Poser claim, throughout which distance the "View" vein maintains great regularity of attitude. In the plane of this cross-section the "View" vein on the 1000 foot level is over 400 feet north of the Poser south side line and nearly 300 feet north of the Emily vein apex in this same section. The Emily vein hangs down from its apex at the surface as a great sheet or wall dipping to the northeast and overlying the "View" vein as illustrated on Diagram No. 14. (Appendix to Appellants' Opening Brief.) According to the trial court's findings, it cannot get past the Emily vein to the north for it will necessarily join it. Nothing shown by appellee would justify any serious contention that the "View" vein reversed its normal dip and passed out of the Poser claim 400 feet distant to the south. In fact, the crosscuts and workings on

the 700 and 500 levels immediately above would disclose this "View" vein of reverse dip if it existed and appellee's witnesses would most assuredly have discovered it if it could be found there. Its non-existence is proof positive that counsel for appellee are only giving "free rein" to their imaginations. The same presumptions which are relied upon to justify a finding that the "View" vein apexes outside of the Poser claim for the easterly 370 feet of its length operate even more potently in this section 309 of appellee's, because here the "View" vein is further inside of the Poser claim toward the north and it is also far underneath the Black Rock fault and, therefore, less affected by its disturbing influence. As we proceed westerly the "View" vein is farther and farther inside of the Poser claim to the north and the same is true of the Emily, so there is no chance of either vein apexing to the south of the Poser claim throughout this area. These observations and deductions are based upon data of appellee's own making solemnly presented at the trial as evidence of its interpretation of the facts and it is highly inappropriate for appellee to now attempt to repudiate this data and argue that a situation entirely inconsistent with its own showing is possible, especially when there is not a shred of reliable evidence to justify such contention.

Another example of the exceedingly tenuous and far-fetched reasoning of counsel for appellee, in their attempt to avoid a situation which their own exhibits demonstrate to exist, is found on page 317 of their brief. They argue that because the "View" vein was

found to have two branches in the easterly end of the 1550 drift and erroneously intimating that only the northerly branch was found by the trial court to unite with the Emily they argue that, perchance, the southerly branch might not join the Emily and might apex south of the Emily apex. The complete answer to this pure supposition is two-fold. In the first place, the trial court based its determination of ownership of this segment of the "View" vein on its junction with the Emily, which finding it reiterates, concluding its decision by saying: "In view of the clarity of the evidence that *the vein in 1736 raise unites with the Emily*" * * * etc. In the second place, both parties agree that this branching occurs near the 1736-A raise and the maps of both sides show this to be the fact. (See defendant's Exhibit No. 172, sketch at top of Sheet 2 (Sales' notes) and plaintiff's Exhibit No. 147 (Simkins' notes) and Diagram Y in appellee's Appendix to its brief.) The branching of the "View" vein is for only a short distance on the level and commencing at about the end line exists *to the east of the Poser east end line plane.* What bearing a minor branching of the "View" vein, outside of the Poser claim, can possibly have on its apex position 400 and more feet to the west, where appellee's exhibits show the "View" vein to be a single vein, is difficult to appreciate. "Grasping at straws" with which counsel charge us in their brief is too mild a designation with which to characterize this kind of reasoning.

"PILOT" APEX CONTROLS "VIEW" VEIN ORE BODY.

In their attempt to avoid this obvious situation, counsel again advert to the branching of the "View" vein as a reason for concluding that both branches may not unite with the Emily. (Appellee's Brief, pp. 320-322.) Evidently, having won in the lower court their contention that the "View" vein joins the Emily so that the apex of the latter controls the segment of vein in dispute, it is no longer to their liking. But they cannot escape the plain and unequivocal showing of their own exhibits. When they wrote their argument based on the splitting of the "View" vein in two branches and giving this as a reason for a non-joinder of the "View" and Emily veins they could not have consulted their own maps. If they had, they would have found that this branching exists east of the Poser east end line plane and further, that every one of their own cross-section exhibits, Nos. 119, 120 and 121 (not appellants, but their own) show the "View" vein as a single vein headed up on a uniform southerly dip straight for the Emily vein and but a comparatively few feet from it.

They urge that nowhere in the record is there any evidence of the line of junction of the "View" and Emily veins on the one hand and of the "Pilot" and Emily on the other. (Appellee's Brief, pp. 321-322.) They ignore their own exhibits, being appellee's cross-sections incorporated in our appendix as Diagrams Nos. 2, 3 and 4. (Defendant's Exhibits Nos. 119, 120, 121.) This is their own interpretation of the situation and they should not be heard to complain of the evidence there presented as to the relative position of

the Emily vein and its two branches, the "Pilot" and "View." These exhibits speak for themselves and it is unnecessary to do more than call attention to our opening brief (pp. 28-31) and the footnotes to these diagrams appearing in the appendix, which diagrams are appellee's own showing of the situation.

THE BLACK ROCK FAULT CREATES A SUB-FAULT APEX FOR THE "VIEW" VEIN.

Counsel complain that the question of a sub-fault apex for the "View" vein "was not presented to the trial court as an issue of fact," etc. (p. 327, Appellee's Brief.) It is difficult to understand what counsel can mean by this statement. The Black Rock fault was considered by both sides as an important and vital feature in this case. Its throw was repeatedly testified to by most, if not all, of the main witnesses, and if there was any uncertainty about the matter, that uncertainty was removed by appellee's own cross-sections already many times referred to. What more in the way of evidence presented at the trial on this feature counsel could have had in mind is not clear. This point was presented to the trial court at the oral argument and a special illustration prepared to emphasize the situation. Counsel lamely state that "there is not a scintilla of evidence in the record to show what the actual throw or displacement of the Emily vein by the Black Rock fault is, at any one of the places, as it appears on these cross-sections," (p. 330 Appellee's Brief) referring to their own exhibits Nos. 119, 120 and 121 appearing as Dia-

grams Nos. 6, 7 and 8 in appellant's appendix. They repeat this language on page 344 and again (p. 339) suggest that their own cross-sections *"may or may not depict the true situation with reference to the throw of the fault."* This is the first time in a somewhat lengthy experience in such cases that we have had opposing counsel question the accuracy of their own map exhibits and not treat them as evidence in the case of the facts which they purport to portray. It has been our experience that a party is usually bound by his own showing and cannot repudiate it at pleasure.

There is no intention on our part, as suggested by counsel (p. 337 Appellee's Brief) to convey the idea that the burden of proof shifted to appellee at any stage of the trial. We are familiar with the invariable rule in such cases. The only point we make in this connection is that when by express admission of the opposing side the vein in question is conceded to extend up from the disputed ore body and enter the subsurface of the extralateral claimant's mining claim in such relationship to the boundaries of that claim and the other features found therein, that it will inevitably apex there unless something to the contrary is proven, then it is incumbent on the party seeking to defeat the right, not to assume the burden of proof, but to produce convincing evidence to overcome the weight of the evidence already adduced. He cannot overcome the showing made by speculation or conjecture.

Counsel question our statement in discussing the *Tom Reed* case that the distance between certain of the segments did not much exceed 100 feet. (p. 347 Appellee's Brief.) While it is true that the court stated that these segments were abut 200 feet apart, it was speaking generally and the very diagram used by the court to illustrate the situation will bear out our statement. (See 200 Pac. 283, *284.*) It will be noted that on the right hand cross-section diagram used by the appellate court to illustrate its opinion and found at the bottom of page 284, the distance of displacement of the right hand segment from the middle segment is as stated in our opening brief. The nearest portions of the faulted edges of these two segments are only a little over 100 feet apart, the distance between the horizontal co-ordinates being 200 feet vertically which affords an accurate scale of distance. The engineers and geologists who testified on both sides of that case admitted that the vein segments there involved were originally, before the faulting, parts of the same vein. Counsel for appellants can speak with unusual assurance regarding that case because one of them actively participated in it.

On pages 344-345 of appellee's brief, counsel discuss the case of *Montana Ore Co. v. Boston Co.,* 27 Mont. 288, also found in 70 Pac. 1114. They quote from the opinion of the Supreme Court of Montana, holding that continuity and identity of the veins in question was established as found by the trial court. The opinion does not state the evidence upon which this finding was based. Then counsel proceed to testify concerning this situation and state that "the movement on the

Rarus fault in this mine was about 240 feet." What sanction have counsel for a statement of this sort, entirely outside of the record? Even if we accept this gratuitous statement as fact, it is only half the truth. Evidently counsel are willing to let this court come to a conclusion that there was a 240 foot dislocation and separation of the faulted segments of the vein in question with barren fault material intervening. But let us see what the real facts of that case were. The Appellate Court, in discussing this question of the faulting of the vein in controversy, says (70 Pac. 1118), "this contention will be understood by reference to the diagrams accompanying the opinion of this court in *Mining Co. v. Heinze,* 26 Mont. ....., 69 Pac. 909." A reference to those diagrams, pictured on page 911 of 69 Pac., will indicate that the Windlass vein, as described by the court in that opinion and as will appear represented on Diagram No. 1, passes entirely through the fault without any apparent dislocation, the workings being shown as extending practically continuously through the fault. Plaintiff's witnesses contended that the "vein is practically vertical." (p. 910.) In a case of this sort where the vein encounters the fault practically at right angles with a vertically dipping vein and the movement of the fault being in the direction of the dip of the vein whether vertical or not, would leave the faulted segments of the vein in such relationship that the vein could be still mined continuously through the fault because there would be no apparent movement of the vein. However, be that is it may, the court says at page 912:

> "While admitting that the fault runs through the country as plaintiff claims, they also produced evidence tending to show that it does not so interrupt the vein as to destroy its continuity and identity along its strike, but that it can be *readily traced entirely through the fault by substantially continuous ore bodies of a character and composition identical with that on either side of it.*"

We have here a picture given by the same court in a preliminary hearing involving the same situation and when we learn the whole truth we find that the facts presented by that case, as far as vein faulting is concerned, have so little bearing upon the question before this court that it is surprising counsel should have cited it. In the case before this court we have two recognized vein segments dislocated and separated for a considerable distance, as evidenced by all of appellee's cross-sections, by what is testified to by witnesses for both parties as a hopelessly barren fault. There is no chance here of following from one segment of the vein to the other "through the fault by substantially continuous ore bodies of a character and composition identical with that on either side of it."

WHERE TWO VEINS, EVEN OF DISTINCT AGES, BECOME COINCIDENT AND COEXISTENT OVER HUNDREDS OF FEET OF DIP AND STRIKE SO THAT THE TWO ARE INDISTINGUISHABLE, THIS RESULTS IN A MERGER OR JOINING OF THE TWO FOR ALL LEGAL PURPOSES.

Counsel do not think it an extraordinary condition that two veins should be found in the same drifts "and the one cannot be identified from the other." (p. 354 Appellee's Brief.) If this is not union of

mineralization, then what constitutes union? The trial court can find that, because two branches of the Emily and "View" veins run alongside of each other for 15 or 20 feet on strike only at a locality to the east of the Poser claim, they are merged and join, though the evidence on the point is conflicting. Yet where there are hundreds of feet of absolute and indistinguishable contact and merger both on dip and strike underneath Poser surface and within Poser boundaries and not one of appellee's witnesses can point to a single place throughout this entire area and say "this mineralization belongs to the View vein and this to the Intermediate," they remain separate and distinct veins.

It is no explanation to compare the merger of the "View" and Intermediate veins with the situation where the Black Rock fault strike-faults the Rainbow vein to which counsel call attention. (p. 355 Appellee's Brief.) There a fault without appreciable mineralization strike-faults a vein. The two features are readily and separably identifiable. Here a vein with accompanying mineralization strike-faults another vein with accompanying mineralization. Who can distinguish the one structure from the other? If appellee's witnesses who advance this remarkable theory fail, the possibility of distinguishing one from the other must be hopeless indeed. Sales, for appellee, says the "View" vein is "lost after it got into the Intermediate". (Tr. p. 2187.) Wiley, for appellee, could not "pick out and definitely distinguish" the one from the other, and "would expect them to be one vein" without "very definite proof to the contrary".

(Tr. p. 1824.) Steele, for appellee, says the "View" vein is "more than a fault", and yet he was unable to distinguish the one mineralization from the other. (Tr. pp. 1627-1629.) Barker, also for appellee, finds the two structures "*combined*". (Tr. p. 1447.)

We respectfully submit that this condition testified to by appellee's own witnesses absolutely establishes a union, a merger, a combination of vein structure and a junction in fact and for all legal purposes. There is no "intersection" here as urged by counsel as a way out of their dilemma. (p. 356 Appellee's Brief.) Sec. 2336, U. S. Revised Statutes, cited by them, refers to veins which "intersect or cross each other", and not to veins which become coincident for hundreds of feet on strike and dip with mineralization flowing together, merged and indistinguishable at all points throughout this extensive area, as appellee's witnesses admit these do. As a matter of fact appellee does not show the "View" vein departing anywhere in the upper workings from the Intermediate and Rainbow after the Intermediate joins the Rainbow. The last Sales or Barker or any of appellee's witnesses see of their "View" vein, it is "lost" and "combined" and incorporated in the Intermediate-Rainbow vein. This is not "intersection". Intersection implies a crossing as the language of the statute plainly indicates. There is no crossing here.

THE APEX OF THE COMBINED INTERMEDIATE-"VIEW" VEIN IS IN POSER GROUND.

We have already covered this situation at pages 67-68 of our opening brief as illustrated by Diagram No. 14. (Appendix to Appellants' Opening Brief.) All that we can add is that if the combined vein does not apex in the Rainbow as the attitude and dip of the two structures indicate, it must appear in the 700 and 500 level crosscuts immediately above the 1000 level where it is last seen. Had it appeared in either of those workings which completely crosscut the area where it must otherwise exist, it is certain that appellee would have called the fact to the court's attention. Both Lawson and Mead searched and could find no evidence that such was the fact. (Tr. pp. 928-929; 684, 686, 690.)

POSER VEIN.

Replying to that portion of appellee's brief devoted to the Poser vein (pp. 103-295), we will confine our comment to those matters only which are particularly pertinent to this appeal. While not attempting to make any reply to their detailed and extensive discussion of geological features, for the reasons previously given, we cannot refrain from commenting upon some of the unjustifiable innuendo and criticism. On page 70, counsel refer to the "reluctance" of appellants to admit that the Black Rock fault was post-mineral and not a vein. On the contrary appellants' witnesses freely admitted the post-mineral character of this fault. (Tr. pp. 143-144, 338, 535-536, 834.)

SALES' PAPER DISCUSSING THE POSER VEIN AS OF STEWARD AGE.

In the attempt to avoid damaging admission by witness Sales, made in his technical paper written years before this litigation, that the "Poser" vein was of Steward age, counsel make a labored attempt to show that what Sales was referring to was Steward "*fissures*" and not *veins*. (P. 90 Appellee's Brief.) As a matter of fact, Sales described these as veins in his professional papers stating that "the Steward veins, like the Blue, exhibit the same variations," etc. (Tr. pp. 1208-1209.) In another professional paper he refers to the ore bodies in the "Steward and Blue vein series" * * * (Tr. p. 1605.) On cross-examination he testified as follows:

> "Q. So you did not differentiate between veins and faults by calling some of these systems later ones than the Blue veins and the Steward, as fault fissures, did you?
>
> A. No, they are both fault fissure veins." (Tr. p. 1183.)

LITIGATION WORK AND ABANDONED WORKINGS.

Counsel, on page 95 and in other portions of their brief, comment disparagingly on the amount of litigation work performed by appellants in this case. They ignore and make no mention of the thousands of feet of litigation work which they themselves performed in the ineffectual attempt to connect up their lower workings with the claimed apices of the State, North State and Badger veins to the south. The immense amount of work done merely corroborates the fact that we are dealing here with a region of extremely

complex geology. As a matter of fact, much of this litigation work was done to develop the admitted vein called "Pilot" by appellee, so that the charge that so much work was run because of the difficulty of identifying the existence of the Poser vein would not apply to this work done to expose the "Pilot" which is described by counsel as "a 'conventional' vein, strong in structure, with well defined walls" (Appellee's Brief p. 113) and which appellee's witnesses spoke of as a "characteristically strong vein". (Appellee's Brief p. 87.) It should also be kept in mind that considerable of this so-called litigation work was done by appellants to explore the country generally for other veins. Counsel have erroneously assumed that all of the work referred to was done by appellants for litigation purposes.

Counsel also on page 98 comment on the abandonment by appellants of certain litigation work which they were carrying on in the vicinity of the eastern end of the Poser claim for the purpose of developing a south branch of the Poser. In view of the fact that appellants freely admitted that these workings did not demonstrate what they had expected them to, it would hardly justify the time consumed by the opposing counsel in going through them in detail and describing matters which have no bearing whatsoever on the issue raised by this appeal.

METHOD OF DEVELOPMENT OF POSER VEIN.

Counsel are hardly consistent when they criticize the method adopted by appellants in development of

the Poser vein. They say that "ordinarily a vein is developed from the surface down", (p. 104 Appellee's Brief) but that appellants had reversed this practice in developing the Poser vein. They are oblivious of the fact that on page 88 of their own brief, they convict themselves of the very charge made against appellants. As a matter of fact, in Butte it is common practice to encounter veins in depth and raise on them, because sinking is difficult from both an operating and financial standpoint and, as the literature and development of the district establishes, many of the veins are barren and weak for hundreds of feet below the surface. By turning to page 88 of their brief, we find that this was the method followed by appellee in encountering and developing the Emily, Badger, Edith May, Jessie, and they might have added the State, veins through a crosscut run from the Diamond *1800 level,* which according to their own statement was the first work performed upon these veins below the surface. We have, therefore, the very excellent mining practice of appellee to justify appellants' method of development of the Poser vein.

COUNSEL MISSTATE DIP OF "PILOT" VEIN NEAR SURFACE.

On page 122 counsel refer to the "northerly" dip of the "Pilot" vein near the surface and suggest that this deterred appellants from adopting it as the Poser. As a matter of fact, appellants knew nothing about the dip of this vein as suggested by appellee, and the "small stope" that counsel mention was filled and there was no knowledge what it had contained until

it was encountered by another working. An examination of appellee's own exhibits (Defendant's Exhibits Nos. 120 and 121), found in appendix to appellants' opening brief as diagrams Nos. 3 and 4, indicates that the "Pilot" has either a vertical or a southerly dip near the surface.

ORDER IN WHICH WORK DONE IS MISSTATED.

Counsel on page 149 build up quite an argument as to the difficulty they assume appellants had in locating the Poser vein on the 500 level by reason of the assumed order in which appellants prosecuted certain work there. Their argument falls to the ground because their statement as to the order in which this work was done is absolutely incorrect. Crosscut 579 and lateral 562 were driven in 1923. Crosscut 581 was then driven in 1924 to cut the Poser vein already exposed at the then end of the 579 crosscut the 579 being later extended a few feet, and in 1926 the short drifts 574 and 580 were run on the Poser vein. This is only one of many incorrect assumptions made by counsel upon the basis of which they proceed to make adverse inferences.

On page 153 counsel state in their brief that the alleged "North State" vein is found in the 716 drift beneath Poser surface "on the hanging wall side of the Black Rock fault, * * * whereas the same vein in the 1000 level is on the footwall side of the fault". It does not take an engineer to realize that this is an impossible correlation. Because there is a downward throw on the hanging wall side of the Black Rock

fault of a minimum of 150 feet, it would place the vein segment found in 716 drift in such a position that it could not by any stretch of the imagination be reasonably correlated with the segment appearing 300 feet below in the 1058 drift and there under the fault. This same error is repeated on page 170 and 185. It is quite evident that this alleged position of the North State vein within Poser subsurface is based upon projections of hundreds of feet of isolated vein segments. The contortions which this vein would have to go through to apex to the south of the Poser claim, and then assume the attitude within the Poser claim that appellee contends it does, and the impossible positions it occupies on both sides of the Black Rock fault, if we reconstruct what would have been its original position, make the changes in the strike and dip of the Poser vein, which opposing counsel comment on unfavorably, simply by comparison.

On page 154 counsel make the erroneous statement that "both maps" show the Jessie to cut and displace the Poser vein in the easterly end of the 716 drift. Their own Diagram E illustrating the situation found in their appendix does not sustain this statement because appellants' map shows no such cutting and displacement. Furthermore, their representation of this situation on this diagram does not agree with the geology on Plaintiffs' Exhibit No. 12 from which this is said to have been taken.

On page 183 counsel comment on the fact that the 1389-A raise was not driven through to the 1000 level above. The court will note that it was driven up

across the Poser south side line and since the Poser vein had been followed to the surface in the west line of raises, it was deemed unnecessary to carry it any further than well within Poser ground in this particular section.

On page 204 counsel criticize the testimony of appellants' witnesses as to the manner in which the mineralizing agencies enriched the Poser vein and the various other veins connecting with the Poser and lying immediately above, as evidenced by the stopes represented on the skeleton models. The position of the Badger stopes from the 1600 down to the 2400 level fit in this theory absolutely. They are on the hanging wall side of the Poser vein and the witnesses testified that the mineralization found its way from below up through the Poser fissure and "leaked out" on the hanging wall side, rising through any fissures it might encounter in the hanging wall. The reason it did not leak out on the footwall side to the same extent is because it is not the tendency of these solutions to go downward. This theory is well established in other mining camps. Corroboration of this theory is found in Mr. Sales' papers where he comments on the enriching influence of veins of Steward age.

ASSAYS OF POSER VEIN.

In replying to appellants' presentation of the assay evidence bearing upon the existence of the Poser vein in certain areas, appellee comments (pp. 209 and 231, Appellee's Brief) upon the fact that appellants' map

shows assay numbers up to 8000, whereas they assert that only 4000 or 5000 assays were introduced in evidence. As a matter of fact, samples numbered above 9000 were taken by appellants. However, this does not mean that more than 9000 samples were taken and assayed. Appellants' system was to use printed tags up to 10,000 in number for the Elm Orlu mine (which sampling had nothing to do with this case), as well as the Poser mine, and when these were used up a new series of samples would be commenced with No. 1. For example, Exhibit No. 59 contains record of sample No. 9034 taken in April 1925, and No. 202 taken in September 1925. Included in this sampling were complete samples of the Intermediate-"View" vein, the results of which were not introduced in evidence because of the very obvious fact that it was admitted to be a vein.

Counsel claim that it was impossible for appellee to do extensive counter sampling to check the results of appellants' sampling because the time did not permit. (Appellee's Brief, p. 209.) This statement would seem to be without foundation because appellants themselves took hundreds of samples in two or three days time to offset appellee's assay evidence which had been introduced toward the close of the trial. Appellee must have known for months before the trial took place that appellants were doing extensive sampling because appellee had trained observers in the mine almost every day checking up the work and they could not escape seeing the evidence of the assay cuts exposed in the various mine workings.

Counsel state in a discussion found on pages 211-213 of appellee's brief that results similar to those of the sampling of the Poser vein could be obtained in any crosscut in the Butte district. This is refuted by appellants' sampling of crosscut 1345, a crosscut parallel to the highly mineralized crosscut 1357 and on the same level which appellee has selected as the basis for this assertion. (Ex. No. 161.)

On page 215 of appellee's brief, counsel cite *Cheeseman v. Shreve*, 40 Fed. 787, to the effect that where there are wide differences in assay results introduced by the respective sides, such evidence is unsatisfactory. This has no bearing here because wherever appellants and appellee have sampled identical sections the results are substantially the same. This is evidenced by their extensive sampling on the 1300 level which corresponds substantially with the similar sampling by appellants on the same level.

While Linforth for appellee found difficulty in finding any boundaries for the Poser vein in order to guide his sampling (p. 215-216 Appellee's Brief), yet Landram, appellant's sampler, found no difficulty in determining these limits. (Tr. p. 790.)

On page 223 appellee's brief, counsel's statement that average samples taken at regular intervals do not present a proper picture of the true situation, would hardly seem to require any answer. This is the common method used in arriving at average results.

On page 226 appellee's brief, counsel insinuate that some of the old sampling, which was obviously defective and rejected, probably was submitted by appel-

lants with the others. This is an unwarranted and unfair assumption, as the dates on which the respective samples were taken, appearing in Exhibit No. 59, will substantiate. With the exception of one sample taken on the 700 level, where the material sampled had been entirely removed by subsequent work so that it was impossible to resample, the samples submitted were of the later character.

Counsel's statement on page 233 that the samples presented by appellants represent only "the better part of the Poser vein" and that samples of the poorer portion were not introduced, is a direct misstatement of the fact. Exhibits Nos. 59 and 69 will show that samples of all of the crosscuts within the Poser vein on this level were introduced.

On page 234 counsel insinuate that appellants' method of sampling, where they desired to make a poor showing, differed from their sampling in other portions of the mine where they wished to show greater mineral values. There is nothing in the evidence to substantiate this and, as a matter of fact, appellants' samples of the Poser vein, both east and west of the Emily, were taken before they had any intimation that appellee was going to concede a vein to exist in any of the workings claimed by appellants to be upon the Poser vein.

On page 237 of appellee's brief, counsel claim that the proper way to have made these averages was by areas and yet they have not told the court what such averages would show. As a matter of fact, appellants made such average of the Poser vein workings

from the 1300 level to the 167 foot level and obtained a higher total average, as far as mineral content is concerned, than by the method adopted, which is not, as counsel erroneously state, an "arithmetical" average but is technically termed a "geometrical" average.

At the top of page 247, where counsel assume that the facts there stated "are beyond dispute" the record itself shows that there is a most material and substantial dispute on these points.

Appellee's comparison of assays on the Black Rock fault in the 1378 drift (p. 248 Appellee's Brief) is just as flagrant a misrepresentation of what the Black Rock fault may be expected to average as is their average of the 1357 crosscut which they advance as typical Butte granite. Their own Exhibit No. 103 shows that this short drift, 1378, intersects six Northwest veins claimed to be branches of the Emily.

On pages 250 and 251, in connection with Diagram T inserted in appellee's brief, counsel attempt to show by Dr. Bateman's notes that appellants' sampling widths are erroneously taken because they are wider than Bateman's red coloring on those notes, indicating vein material. A casual inspection of this diagram and the assay results will indicate that counsel are in error. For example, one sample assaying 2.8 per cent copper is taken across a section where Dr. Bateman's representation of the vein is only two inches, and at another point where his notes show a vein twelve inches wide, appellants' assay shows only 1.68 per cent copper. Bateman expressly states (Tr. p. 1374)

in his testimony that in mapping veins he did not include any mineralized granite, notwithstanding the fact that mineralized granite is generally conceded to be an important part of Butte vein filling.

On page 255 counsel state that appellants, in their assay evidence of the easterly part of the Poser or "Pilot" vein, included "19 samples in the crosscut". (They refer to X cut 749 which is outside of what appellee claims to be the "Pilot" vein.) As a matter of fact, if they will examine the assay evidence presented by appellants on this point a little more carefully, they will find that no samples whatever from this crosscut were included in the estimate, so that the critical argument which they build up on this assumption falls of its own weight.

On page 259 counsel cite the testimony of their witness, Sales, in support of their statement that a segment of the North State vein is shown in drift 728 westerly of crosscut 729. An examination of Sales' testimony (Tr. pp. 1151-1152) will establish the fact that Mr. Sales disagreed with his co-witnesses Barker and Steele; and Bateman, while recognizing a vein there, does not call it the North State.

On page 266 counsel present what they claim to be a computation of averages of appellants' assay results of samples of the Poser vein from the 167 to the 1300 levels, showing a materially lower mineral content than the averages computed by appellants from the same data. Obviously this court will not make any computation in order to see which side is correct. But in the court below, before the oral argu-

ment, appellants were served with defendant's (appellee's) brief containing this same result. We immediately delivered them the detailed calculations made by appellants' engineers and requested them to notify us a sufficient time before the oral argument before the trial court how they obtained their result, in order that we might check such calculations. To this day they have failed to furnish us with any satisfactory data or detailed figures of how they arrived at their result, stating that they had destroyed these figures, while appellants have submitted their calculation in complete detail. Appellants' engineers have been unable to check appellee's calculations because the data supplied by appellee has been entirely inadequate.

On pages 267 to 274 counsel comment on the trial court's exclusion of Exhibits Nos. 153 and 154, marked for identification. They state that no proper exception was taken to the exclusion of these exhibits. The witness, Roddewig, had been put on the stand by appellants to explain these exhibits which were certain graphic representations of the results of sampling the Black Rock gouge, as distinguished from the Poser vein, and of the Poser vein itself throughout certain areas, together with the assay sheets upon which these graphic representations were based. Copies of these graphic results appear in the appendix to appellants' brief as diagrams Nos. 18 and 19. The court would not allow the witness to proceed and sustained appellee's objection to this "line of testimony". Opposing counsel's objection was directed specifically to "this line of testimony", mentioning these particular

"samples" (meaning assay results). (Tr. p. 2062.) The court sustained this objection. (Tr. p. 2063.) As the transcript shows (p. 2060) the witness had been handed these graphs and sample results and was explaining them at the time the objection was made, and they became a part of his testimony. While a specific offer of these data might have been technically more appropriate, we submit that there is no possible misconstruction to be placed on this situation and to have pressed the matter further would have only irritated the court, to no good purpose. On page 270 counsel erroneously state that these sample results had already been introduced in evidence and included in the envelope marked "Plaintiffs' Exhibit No. 59", which contained the blue print sheets of assay results of sampling introduced in plaintiffs' main case, and, as the clerk's file mark will show, on October 19, 1926. Counsel then proceed to use certain of these excluded data in their average gouge sample calculations presented in Appellee's Brief on page 273 (see also top of page 275), again erroneously stating that they come from Appellants' Exhibit No. 59, whereas these assay sheets indicate the dates when the sampling occurred, which were October 21 and 22, 1926. Counsel are obviously in error in making these statements. It is unusual to have opposing counsel base their arguments on evidence which was excluded by reason of their own objection, and, of course, they use that portion of it which they consider favorable to their contentions and ignore the rest.

On pages 278 and 281 counsel refer to Diagram V of appendix to appellee's brief, purporting to be a

cross-section of 1346-A raise with the geology taken from Defendant's Exhibit No. 124. An examination of this original exhibit will disclose the fact that the drag colored in red between floors 29 and 41 on the diagram does not appear on this original exhibit and therefore their argument based upon the presence of this drag should be ignored.

On page 288 counsel enumerate a number of drifts which are admitted to contain the Black Rock fault and which they claim show average assay values substantially the same as the average of appellants' samples of the Poser vein from the 1300 level up. This is of course to be expected because these drifts are also claimed by appellants to be within the Poser vein; and, because appellee's sampling is very close in result to that of appellants' in other parts of the Poser vein, it furnishes corroborative evidence of the accuracy of appellants' sampling.

In spite of appellee's repeated attempts to "muddy the waters" there is no substantial difference between appellants' and appellee's basic sampling and assay results where comparisons are possible thus establishing the fact that appellants' assays are reliable and accurate. We respectfully submit that this assay evidence establishes the Poser vein to exist "in contemplation of law".

COSTS.

On page 363 counsel cite 79 Fed. 277 as an authority indicating that costs cannot be retaxed on appeal unless an assignment of error is made in this connection. The case has no pertinency here. We are not endeavoring to retax costs. To have applied to the court below to retax costs would have been a foolish and useless procedure, because the trial court had decided that "plaintiffs take nothing", and costs to defendant followed as a matter of course. The trial court said nothing about costs in its decision and appellants assigned as error (XXVII Tr. V, p. 2263) "the making and entering its decree" which automatically gave costs to defendant below. As the Supreme Court of the United States has said in *Clerke v. Harwood,* 3 Dall 342, "costs must follow the right as decided here", referring to costs below. This court has the undoubted power to determine this question of costs in connection with its hearing and disposition of the case here because, as we have pointed out, the invariable rule in actions to quiet title is to award plaintiff costs when he prevails and establishes his title to any substantial part of the ground in controversy.

CONCLUSION.

In conclusion we respectfully submit that appellants have shown themselves entitled to the entire "View" or Intermediate vein, whichever it may be called,

extralaterally between Poser end line planes, and also to the Poser vein, upon appellants' assay showing.

Dated, San Francisco,
November 14, 1927.

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